United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 13, 2000

TO : Celeste J. Mattina, Regional Director

Region 2

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Riverbay Corp. d/b/a Co-op City 506-4033-1200 506-4033-7600

Case 2-CA-32617 506-4067-7600

512-5012-0133-2200

512-7550-0143

This Section 8(a)(1) and (3) case was submitted for advice concerning the legality of an Employer rule under $\underline{\text{Lafayette Park Hotel}}^1$ against employee participation in Board of Director elections.

The Employer is a residential housing cooperative which is owned by its own residents who thereby are corporate shareholders. The Employer's employees are represented by an in-house Union. Employee Pizzano is both a safety officer employee of the Employer, as well as the President of the Union. In addition, Pizzano is a resident of the Employer and thus a corporate shareholder.

In May 1999, the Employer held an election for its Board of Directors involving candidate Baez, who had been openly critical of the Employer's security system and its safety officers. The Union held numerous meetings to discuss how to defeat Baez in that election. Pizzano eventually volunteered to use his position as resident shareholder to distribute a flyer against Baez.

Both the Union and Pizzano were aware of the following Employer rule against resident-employee participation in Board of Director elections:

Employees living in Co-op City are encouraged to individually exercise their rights as residents of the community during the Board of Directors election. They shall refrain, however, from engaging in any activity, such as organizing other employees, that might be construed as an attempt to use their position for the purpose of influencing the outcome of the election. All employee groups and organizations are prohibited

¹ 326 NLRB No. 69 (1998).

from participating either directly or indirectly in the electoral process. They may not raise funds, give donations, encourage their members to give donations, issue endorsements, distribute campaign material or engage in any other activity that may reasonably be expected to benefit a particular candidate or group of candidates.

This policy does not affect employees' right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or their right to refrain from any or all such activities.

In light of above rule, Pizzano visited the Employer's attorney to discuss publishing an election flyer. Employer's counsel advised Pizzano that he could not engage in election activity while in uniform or on the clock and that any flyer he distributed could not identify Pizzano as an employee or Union officer. Counsel declined to accept Pizzano's offer that he review a proposed flyer.

Pizzano distributed a flyer which contained only his name and address, making no reference to either his employee status or Union position. The flyer was a pointed attack against Baez, calling her policies "disruptive and unprincipled". The flyer stated, inter alia, that Baez's position for lobby attendants would cause rent increases, and that her position against security kiosks had been supported by another union which represents guards because her program was one which any union would love.

Immediately thereafter, Baez distributed a flyer in direct response to Pizzano's flyer. Baez's flyer labeled Pizzano a "liar" for having concealed his status as Union president. Baez stated that Pizzano's real opposition to her policies was that they interfered with the employment of Union members.

Baez won election to the Board of Directors. Shortly thereafter, the Employer discharged Pizzano on the ground that his flyer had violated the rule against resident-employee participation in elections, and also had been defamatory and disloyal. A Union grievance over Pizzano's discharge eventually proceeded to arbitration. On August 22, 2000, an arbitrator found that Pizzano had violated the rule, but that discharge had been too severe a penalty. The arbitrator thus reinstated Pizzano with all but two

weeks of backpay. The arbitrator never considered the validity of the rule under which Pizzano was disciplined.²

We conclude, in agreement with the Region, that the original Employer rule and its application to Pizzano was unlawful, and that the arbitration award warrants no deference because it is repugnant to the Act.

In Lafayette Park Hotel, the Board stated, slip op. at 2:

In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent enforcement.

In <u>Lafayette Park Hotel</u>, the Board found unlawfully overbroad a rule that prohibited "false, vicious, profane

The election of the Board of Directors is a right of residents in Co-op City. Employees living in Co-op are encouraged to exercise their rights as residents ... All Riverbay employees are reminded that as employees they have a duty of loyalty to Riverbay and should not engage in any activity which raises the appearance of impropriety. Participation in the electoral process must not interfere with employees' work duties. All employees shall refrain from engaging in any activity which might be construed as an attempt to abuse their positions as employees for the purpose of influencing the outcome of the election. Examples of acts that may be deemed to be an abuse of employee position include: soliciting donations for particular candidate(s), distributing campaign material for or against particular candidate(s), or engaging in other activity which may be reasonably construed as an abuse of position. This policy does not effect [sic] employees' right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

² After the instant charge was filed, the Employer changed the above cited rule to the following:

or malicious statements" because it would prohibit forms of labor speech, such as false but not maliciously defamatory statements which are protected by Section 7.

We conclude first that the original Employer rule was actually applied to Section 7 activity, resolving any ambiguity in the rule thus making it unlawful.

Although the Employer rule allowed employee-residents to "individually" exercise their election rights, it forbade "any activity such as organizing other employees", and specifically provided: "All employee groups and organizations are prohibited from participating either directly or indirectly in the electoral process." Such language arguably is unlawfully over broad because employees reasonably could interpret it to prohibit activities that are protected by Section 7. We note, however, that the rule was actually applied to Pizzano's activity. To the extent that Pizzano's conduct encompassed Section 7 activity, any possible ambiguity in the rule was thereby erased and the rule became clearly unlawful as intentionally applied to Section 7 activity.

Employee action such as Pizzano's, seeking to influence the identity of management hierarchy, is normally unprotected activity because it lies outside the realm of legitimate employee interest. Such employee activity may be protected, however, if the identity or actions of the supervisor or manager have a "direct impact" on the employees' terms and conditions of employment. The link

³ <u>NLRB v. Oakes Machine Corp.</u>, 897 F.2d 84 (2nd Cir. 1990); Retail Clerks Union, Local 770, 208 NLRB 356, 357 (1974).

⁴ See, e.g., <u>West Texas Hotels, Inc.</u>, 324 NLRB 1141 (1997) (employee unlawfully fired for relating employees' concerns that a husband-wife management team had a detrimental impact on the employer's "open door" policy for registering employee complaints); <u>Atlantic-Pacific Construction Co., Inc. v. NLRB</u>, 52 F.3d 260 (9th Cir. 1995) (employee protest over selection of supervisor protected, because supervisor would have immediate authority over protesting employees, directing daily work activities and having the authority to hire, fire, and set wages with only minimal consultation with higher management); <u>The Hoytuck Corp.</u>, 285 NLRB 904, n. 3 (1987) (employee letter seeking discharge of cook-supervisor because of cook-supervisor's treatment of employees protected because cook-supervisor's conduct had direct

between the identity of the supervisor or manager and employee terms and conditions is a factual question to be determined by the totality of the circumstances. <u>Oakes</u>, 857 F.2d at 89.

We conclude first that Baez's election to the Board of Directors had sufficient direct impact on Pizzano's and his fellow employees' terms and conditions of employment to bring Pizzano's and the Union's involvement in her election within the ambit of Section 7.

In Senior Citizens Coordinating Council, 5 employees wrote a letter to the primary funding source of the particular Employer's division for which they worked. The letter protested that the current Acting Director of that Division was unqualified and provided the employees with no supervision. Previously, the funding source for this Employer Division had notified the Employer that this proposed Acting Director did not minimum standards for her position. The ALJ found the employees' letter did not encompass protected activity. Although the ALJ noted the letter's reference to insufficient supervision, he discounted the impact of lack of supervision on the employees' positions. The ALJ also noted that the employees' other employment concerns were not specifically addressed in their letter.

The Board disagreed and found the employees' letter protected, noting first that lack of supervision was a valid employment concern for the employees. The Board also noted, however, that the mere fact that the employees' letter did not specifically refer to their other employment concerns "does not mean that we cannot take them into account in determining whether [the employees'] activities were protected." Id., slip op at 5, note 15.6 The Board

impact on employee working conditions); <u>Caterpillar, Inc.</u>, 321 NLRB 1178, 1179 (1996) (employees seeking removal of employer CEO protected because of CEO's impact on employee working conditions).

⁵ <u>Senior Citizens Coordinating Council of Co-op City</u>, 330 NLRB No. 154 (2000).

The Board cited Atlantic-Pacific Construction Co. v. NLRB, supra, 52 F.3d at 263, where the court conceded that it was not clear from the context of an employee letter whether it related to employment concerns, but then stated that "[s]pecificity and/or articulation are not the touchstone of ... protected activity [Citation omitted]. The nexus

held that the employees could reasonably believe that, \underline{if} the quality of the service provided by the Employer's Division fell below acceptable levels because of inadequate supervision, and \underline{if} the Employer did not hire a qualified Director who met \underline{with} the approval of the funding source, then the funding source could refuse to renew its contract or otherwise reduce its funding, which in turn would have a "direct impact" on the employees' terms and conditions of employment.

In the instant case, Baez had been an open opponent of the current security system, and her proposed new policies, if implemented, would have had a seriously adverse impact on Pizzano and his fellow employees. The fact that Baez was but one Director among several on the Employer's Board, and thus could not immediately implement her policy means only that her election did not have an immediate impact; it but does not mean that it didn't have a "direct impact." In fact, in Senior Citizens Coordinating Council, the link between the identity of the Acting Director and the Employer's funding source was more attenuated than the connection in the instant case between Baez's election and Pizzano's employment. We therefore conclude that Baez's election had a sufficiently "direct impact" upon Pizzano's employment so that Pizzano's flyer could encompass Section 7 activity.

We also conclude that Pizzano's flyer was protected by Section 7. Although the flyer did not refer directly to employment terms, Pizzano's conduct must be viewed in the totality of circumstances. See note 6, supra. In that regard, both the employees and Baez clearly understood Pizzano's flyer to have been motivated by his and the Union's employment concerns. In fact, Baez herself later circulated another flyer announcing this employment linkage to everyone including the Employer. Since the Employer's original rule was thus directly applied to Section 7 activity, it is unlawful.

Regarding Pizzano's discipline, the fact that Pizzano was disciplined pursuant to an unlawful rule would make his discipline also unlawful, <u>unless</u> the Employer can independently justify that discipline.⁷ In Daylin, the

between the activity and working conditions must be gleaned from the totality of the circumstances."

^{7 &}lt;u>Daylin, Inc.</u>, 198 NLRB 281 (1972).

Board stated that a rule that unlawfully restricts employee solicitation:

can provide no justification for the discharge of an employee who violated it. Therefore, if an employee is discharged for soliciting in violation of an unlawful rule, the discharge also is unlawful unless the employer can establish that the solicitation interfered with the employees' own work or that of other employees, and that this rather than violation of the rule was the reason for the discharge.

Thus, where an employer can adduce a separate reason not implicating Section 7 for discipline, apart from an unlawful rule, such discipline is lawful.

In the instant case, the Employer's contention that Pizzano's flyer was unprotected as "disloyal" is clearly without merit, because the flyer in no way denigrated either the Employer or its services. The Employer also contended that Pizzano's flyer was unprotected as "defamatory." It seems clear, however, that the flyer was not so "disloyal, reckless, or maliciously untrue" as to have been unprotected. 9

[FOIA Exemptions 2 and 5

.101

Finally, regarding the Employer's new rule, it eliminates the prior rule's reference to "organizing other employees", referring instead to conduct that "raises the appearance of impropriety" or that might be construed as "an abuse of employee position". This language, standing alone, arguably is lawful because employees would interpret

⁸ Compare NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting), 346 U.S. 464 (1953).

 $^{^9}$ See, e.g., <u>Emarco</u>, <u>Inc.</u>, 284 NLRB 832, 834 (1987) (remarks about employer's financial irresponsibility, including name calling, protected by Section 7 as related to labor dispute and neither malicious nor disloyal).

^{10 [}FOIA Exemptions 2 and 5

it as directed solely against conduct which would be intrusive into the Employer's election process. However, the new rule arose against the background in this case, i.e., direct application of the first rule to Section 7 activity, and it also was promulgated without first remedying the above violations generated by the first rule. In these circumstances, the new rule's language arguably is ambiguous and could be reasonably interpreted by employees as also applying to Section 7 activity.

[FOIA Exemptions 2 and 5

.]

B.J.K.